KENT GREGERSEN
v.
BUREAU OF LAND MANAGEMENT

IBLA 82-149 Decided February 17, 1982

Appeal from the decision of Administrative Law Judge Robert W. Mesch dismissing appeals from decisions of the Bureau of Land Management rejecting grazing permit applications. UT 040-81-3.

Affirmed.

1. Grazing Permits and Licenses: Generally

Decisions rejecting applications for a free-use and a fee grazing permit are properly upheld where the applicant does not meet the qualifications for a free-use permit under 43 CFR 4130.3 and where the entire adjudicated grazing capacity of the allotments involved has been allocated to other permittees and uses.

APPEARANCES: Kent Gregersen, pro se; Reid W. Nielson, Esq., Office of the Regional Solicitor, Department of the Interior, for Bureau of Land Management; Charles Dester, intervenor, pro se; Robert Olsen, intervenor, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Kent Gregersen has appealed the decision of Administrative Law Judge Robert W. Mesch dismissing his appeal from two final decisions of the area manager, Sevier River Resource Area, Bureau of Land Management (BLM), denying his applications for either a free-use or fee grazing permit for the Ogden and Tate allotments in Utah.

Appellant submitted an application for a free-use grazing permit dated January 27, 1981, to license 10 cattle to graze on the Ogden and Tate allotments from February 1 to October 31 and another grazing permit on the Deer Flat allotment for 10 cattle during the same period. BLM issued a proposed decision denying the application which appellant protested on February 19, 1981. After considering the issues raised by appellant in his protest, BLM issued its final decision on March 2, 1981, denying the two permits. 1/

1/ On Apr. 20, 1981, appellant withdrew his application for the Deer Flat allotment permit.

BLM gave four reasons for its denial of the requested free-use permit for the Ogden and Tate allotments:

1. Appellant's private land is not contiguous to the public land. (Citing 43 CFR 4130.3, 4100.0-5(i), and 4130.2(e)(4).)

2. The entire grazing capacity of the allotments is allocated to existing uses and users, and 43 CFR 4120.2-1(a) states that authorized livestock grazing use shall not exceed grazing capacity. Thus there is not sufficient forage to grant the permit.

3. Appellant has no historical use of the public land in the area at issue and regulations 43 CFR 4110.5(a) and 4130.2(e) allow allocation of grazing use on the basis of historical or prior use of the land.

4. Appellant has not demonstrated a sufficient showing of need for a free-use permit under 43 CFR 4130.3.

On March 12, 1981, appellant filed an appeal requesting that a hearing be held on his application. In his notice of appeal, he alleged:

1. The rendering of the final decision by the same person who issued the proposed decision, J. Roderick Lister, Area Manager, created undue delay and hardship since there was no neutral mediator.

2. His land "is contiguous by public right-of-way" and he is negotiating for another right-of-way.

3. The Ogden and Tate allotments have had no use for 20 years except small numbers of deer in the winter.

4. Mr. Lister never met with him on the land to verify his decision.

5. The decision did not give any information as to what constitutes sufficient need for grazing.

6. The decision disregards the purpose of the Range Improvement Act of 1978, 43 U.S.C. §§ 1901-1908 (Supp. II 1978), which reaffirms the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315, 315a-315r (1976).

The hearing was scheduled for August 12, 1981, before Administrative Law Judge Robert W. Mesch in Richfield, Utah.

By application dated May 28, 1981, appellant requested a fee grazing permit in the Ogden allotment for 10 cattle for the period January 1 to December 31. BLM issued a notice of proposed decision denying the application on June 22, 1981. Appellant protested for essentially the same reasons addressed with respect to his January application and indicated that he would like the scheduled hearing to cover this application as well. BLM issued a final decision on August 4, 1981, which gave the following reasons for the rejection:

1. The application was not in accordance with the Ogden land use plan because the grazing period applied for would conflict with the adjudicated season of use and a year-long period would be detrimental to the forage. (Citing 43 CFR 4110.2-2(a).)

2. The entire grazing capacity is currently allocated to existing uses and users.

3. Appellant has no historical use of the public lands in this area.

At the outset of the hearing Judge Mesch agreed to hear evidence as to both applications on the strength of appellant's assertions that he considers them to be the same application in two different forms, free-use and fee, and that he actually only desires one permit for which he is willing to pay a fee (Tr. 5-6, 8). Appellant also indicated that he did not expect a year-long permit, rather he was willing to accept the period determined appropriate by BLM (Tr. 6-7).

At the hearing, appellant testified on his own behalf and Area Manager J. Roderick Lister testified for BLM. Also present were Charles Dester and Robert Olsen who own property and hold BLM grazing permits in the area at issue. Judge Mesch granted them intervenor status and permitted them to comment or question as appropriate.

In his November 3, 1981, decision, Judge Mesch summarized the evidence and ruled as follows:

> The appellant owns approximately 7 acres of land that he acquired from his father in 1978. His father purchased the land in 1941 or 1942 for a sawmill operation. The land has not had any grazing privileges attached to it since at least the early 1940's. The appellant moved from Salt Lake City to the land in 1978. At the present time he has a house, corrals, water facilities and an irrigated pasture on the land. He has been raising Texas Longhorn cattle on the land and plans to switch to an African Watusi crossbreed. He is otherwise gainfully employed on a full-time job. The appellant is desirous of obtaining either a free-use grazing permit or a fee grazing permit for 10 head of cattle for the established season-of-use in either the Ogden or the Tate Allotments.
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> The evidence establishes that the Area Manager acted properly in denying the appellant's application for a free-use grazing permit. The appellant's residence is not adjacent to the public lands in either of the two allotments and, as a result, he is not qualified for a free-use grazing permit under 43 CFR 4130.3. In addition, the appellant did not establish that he needs the public lands applied for to support domestic livestock that he owns and whose products or work are used directly and exclusively by the appellant and his family as required by 43 CFR 4130.3. Furthermore, the entire adjudicated grazing capacity of

> the two allotments is, and has been for a period of years, allocated to other permittees and, as a result, it would be (1) violative of 43 CFR 4120.2-1(a) to authorize livestock use in excess of the adjudicated grazing capacity of the land and (2) violative of 43 CFR 4110.5(a) and 4130.2(e) to give the appellant a preference or priority over the existing permittees in the two allotments.
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> For the last reason noted above, it must also be concluded that the Area Manager acted properly in denying the appellant's application for a fee grazing permit.
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> The Ogden Allotment has an adjudicated grazing capacity of 350 animal unit months (AUMs). The season of use is May 1 to July 15. If the appellant was licensed for 10 cattle in this allotment he would obtain 25 AUMs of public land forage. From 1971 to 1981, both years inclusive, the permittees in this allotment have been authorized nonuse for a number of AUMs far in excess of the 25 AUMs sought by the appellant. The appellant cannot understand why he should be denied a license to use a part of the forage on the public land that has been going unused for the past 10 years. I can readily understand the appellant's position. Unfortunately, under the circumstances of this case and in view of the regulatory scheme, I have no alternative other than to uphold the decisions of the Area Manager.

Judge Mesch declined to rule on the propriety of BLM's past authorization of nonuse because the issue was not specifically raised, no evidence from which to draw a conclusion was presented, and action towards cancelling the grazing preference of existing permittees would be improper without adequate notice and an opportunity to defend their position.

On appeal to this Board, appellant reiterates that no one has gone "on the site" to determine the true status of the grazing question. He asserts that the maps and reports introduced by BLM at the hearing were not accurate. He contends that BLM's grazing records were not accurate because the records have not been matched against actual use. He argues that Judge Mesch erred in stating that there had been 10 years of nonuse of the lands when in fact he had testified to 20 years. Finally appellant claims that BLM employees hold a personal grudge against him and cites certain incidents of alleged harassment.

[1] We have thoroughly reviewed the record of this case and considered the matters raised by appellant. We find that Judge Mesch has accurately set forth the relevant evidence and agree with his findings and conclusions. On appeal, appellant has not presented any evidence demonstrating a specific error in the Judge's findings.

Departmental regulations governing grazing administration, 43 CFR Part 4100, set out a precise scheme for the uniform administration of livestock grazing on the public lands. BLM is bound to follow these regulations. See

Arizona Public Service Co., 20 IBLA 120 (1975). The regulation applicable to free-use grazing permits, 43 CFR 4130.3, states two precise requirements for permit issuance:

> A free-use grazing permit shall be issued to any applicant whose residence is adjacent to public lands within grazing districts and who needs these public lands to support those domestic livestock owned by the applicant whose products or work are used directly and exclusively by the applicant and his family. The issuance of free-use grazing permits is subject to § 4110.5. These permits shall be issued on an annual basis. These permits cannot be transferred or assigned. [Emphasis added.]

In testimony appellant admitted that his land was not contiguous to the public lands at issue 2/ but suggests that this is not important. He contends that when the regulations were written there was no livestock transportation whereas today livestock are easily transported from place to place (Tr. 20-21). Similarly, he suggests that the need requirement is outdated because it was intended to aid people "dependent solely on what they could raise to eke out a living" in the depression years (Tr. 31-32). Regardless of the merits of these observations, the regulation remains in effect. We find that it must be interpreted as authorizing free grazing only in those limited cases where the applicant is a resident on adjacent land who needs grazing rights to support domestic livestock. Appellant does not meet the regulatory requirements for a free-use permit.

With respect to both permits, BLM has established that the entire adjudicated grazing capacity of the Ogden and Tate allotments was allocated to other users at the time appellant submitted his application (Exh. B; Tr. 57-60). Regulation 43 CFR 4120.2-1, captioned "Mandatory terms and conditions," states in part:

> (a) The authorized officer shall specify the kind and number of livestock, the period(s) of use, the allotment(s) to be used, and the amount of use, in animal unit months, that can be made in every grazing permit or lease. The authorized livestock grazing use shall not exceed the livestock grazing capacity and shall be limited or excluded to the extent necessary to achieve the objectives established for the allotment. [Emphasis added.]

2/ Appellant's charge that BLM's map was not accurate presumably refers to Exhibit A which shows the Ogden and Tate allotments and the position of appellant's privately owned land with respect thereto. At the hearing, appellant stated that the western boundary of his property extended 250 to 300 feet further to the west to a fence than the BLM map reflected and thus put him closer to the public lands for purposes of access. The BLM map was taken from county records. It was agreed that, in either case, the boundary did not join the public land (Tr. 16-18). Therefore, for the purposes of this appeal, the alleged error is immaterial.

Therefore BLM had no alternative but to reject the application under the regulations.

Exhibit B details the licensed use history of both the Ogden and Tate allotments since a 1966 readjudication of grazing capacity and season of use and identifies current and past permittees with a history of their licensed use of the allotments. Presumably these are the BLM records which appellant suggests are not accurate because BLM has not matched actual use to them. In fact, however, the records only purport to show licensed use. Under the regulation, where the entire grazing capacity of the allotments has been licensed, BLM may not issue further grazing permits.

We conclude that Judge Mesch properly declined to rule on the issue of the actual use or nonuse of the allotments as compared to the licensed use or nonuse. We note, however, that appellant's assertion of 20 years actual nonuse is based on an average 10 days a year personal observation until 1979 when he actually moved onto his land (Tr. 27-28). Further, as Judge Mesch has noted and Exhibit B reflects, a certain amount of nonuse has been specifically licensed for various reasons. 3/ Such licensing is permissible under 43 CFR 4130.2(b).

Finally appellant's allegations of bias and harassment do not appear to relate to the applications at issue and, in any event, were not raised at the hearing. Therefore, they have not been considered by the Board. 43 CFR 4.478.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of Administrative Law Judge Mesch is affirmed.

Douglas E. Henriques
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

Edward W. Stuebing
Administrative Judge

3/ The reasons listed for authorized nonuse include: "Annual fluctuation in livestock operation," "financial or other reasons beyond the control of the operator," and "conservation and protection of the public lands."